

Exhibit 46

James T. Kenney

September 20, 2004

Wellesley, MA

1

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 NO. 01CV12257-PBS

4
5 In re: PHARMACEUTICAL)

6 INDUSTRY AVERAGE WHOLESALE)

7 PRICE LITIGATION)

8)

9 THIS DOCUMENT RELATES TO:)

10 ALL ACTIONS)

11)

12 DEPOSITION of HARVARD PILGRIM HEALTH
13 CARE BY JAMES T. KENNEY, called as a witness by and
14 on behalf of the Defendants, pursuant to the
15 applicable provisions of the Federal Rules of Civil
Procedure, Rule 30 (b) (6), before P. Jodi Ohnemus,
16 Notary Public, Certified Shorthand Reporter,
17 Certified Realtime Reporter, and Registered Merit
18 Reporter, within and for the Commonwealth of
19 Massachusetts, at the offices of Harvard Pilgrim
20 Health Care, 93 Worcester Road, Wellesley,
21 Massachusetts, on Monday, 20 September, 2004,
22 commencing at 10:50 a.m.

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| <p style="text-align: right;">6</p> <p>1 Q. How long have you been employed by Harvard 2 Pilgrim?</p> <p>3 A. 24 years.</p> <p>4 Q. If you would, walk through for me the 5 various positions you've held and responsibilities 6 in those positions you've held over the last 24 7 years.</p> <p>8 A. Staff pharmacist was the first position, 9 just general dispensing pharmacy responsibilities, 10 fill prescriptions. Then I was assistant director 11 of pharmacy. My responsibilities were just 12 managing the day-to-day pharmacy operations, 13 managing the staff.</p> <p>14 Q. Uh-huh.</p> <p>15 A. Also, still fill prescriptions as 16 assistant director. Then I was a chief pharmacist 17 at one of our pharmacies and same responsibility 18 really as a chief as it was with an assistant 19 director.</p> <p>20 Q. Uh-huh.</p> <p>21 A. Just a different -- kind of a different 22 title. And then after that, I became pharmacy</p> | <p style="text-align: right;">8</p> <p>1 A. They had a group model, group practice 2 model HMO.</p> <p>3 Q. What is a group practice model HMO?</p> <p>4 A. It's a model where the -- a physician 5 group is contracted with the insurer to provide 6 services for the members who select the physician, 7 who is or participates in that particular group.</p> <p>8 Q. In the group practice model, did Harvard 9 Community contract with independent pharmacy 10 groups?</p> <p>11 MR. HORGAN: Objection. You can answer.</p> <p>12 A. I'm trying to recall. Harvard Pilgrim 13 contracted with a third-party claims processor at 14 that time. I'm not sure what the relationship was 15 directly with the pharmacies.</p> <p>16 Q. Uh-huh. Who was the claims processor?</p> <p>17 A. Programs & Analysis.</p> <p>18 Q. Do you have an understanding of whether 19 Programs & Analysis had its own network at that 20 time?</p> <p>21 A. I don't recall. I don't know.</p> <p>22 Q. Okay. With respect to the staff model HMO</p> |
| <p style="text-align: right;">7</p> <p>1 operations manager, and that was in 1988. And I've 2 held that position since then. And that position 3 involves negotiating contracts.</p> <p>4 Q. When you say, "negotiating contracts," was 5 it negotiating contracts between Harvard Pilgrim 6 and pharmacy groups?</p> <p>7 A. No, Harvard Pilgrim and manufacturers.</p> <p>8 Q. And manufacturers. Let me back up to when 9 you were a staff pharmacist. When you say, "staff 10 pharmacist" for Harvard Pilgrim, Harvard Pilgrim 11 owned pharmacies at that time?</p> <p>12 A. Well, Harvard Pilgrim was known as Harvard 13 Community Health Plan at that time.</p> <p>14 Q. Is that a staff model HMO?</p> <p>15 A. Correct.</p> <p>16 Q. Aside from the staff model HMO, did 17 Harvard Community offer any other health plan or 18 product?</p> <p>19 A. When I was a staff pharmacist, no.</p> <p>20 Q. At any point in time since you started 21 till the merger in 2000, did Harvard Community 22 offer any product other than the staff model HMO?</p> | <p style="text-align: right;">9</p> <p>1 that is run by Harvard Community, is that still in 2 place?</p> <p>3 A. No.</p> <p>4 Q. When did Harvard Pilgrim -- Harvard 5 Community or Harvard Pilgrim dissolve that staff 6 model HMO --</p> <p>7 MR. HORGAN: Objection.</p> <p>8 Q. -- or otherwise sell it?</p> <p>9 MR. HORGAN: Objection.</p> <p>10 A. I don't know. I don't recall the date.</p> <p>11 Q. Just generally.</p> <p>12 A. I know it became a group practice model a 13 few years ago.</p> <p>14 Q. So, it's fair to say at some point in time 15 the staff model HMO run by Harvard Community was 16 transformed into a group practice model.</p> <p>17 A. Yes.</p> <p>18 Q. Okay. How did -- let me back up. Just 19 for the record, when we say, "staff model HMO," 20 that is with reference to a Health Plan that 21 Harvard Pilgrim offers to its members, whereby 22 Harvard Pilgrim owns the pharmacies and owns the</p> |

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| <p>1 physician clinics that provide services to the 2 Harvard Pilgrim members, is that correct? 3 A. Yes. 4 Q. How did Harvard acquire the drugs that 5 were dispensed in its pharmacies through the staff 6 model HMO? 7 MR. HORGAN: Objection. 8 A. It purchased them either direct from a 9 manufacturer or through a wholesaler. 10 Q. Similarly, with respect to the drugs 11 dispensed -- withdraw that question. With respect 12 to the drugs administered in physicians' offices, 13 how did Harvard acquire those drugs -- 14 MR. HORGAN: Objection. 15 Q. -- through the staff model HMO? 16 A. Same, either direct or through the 17 wholesaler. 18 Q. Were you involved at all in the 19 contracting or negotiation for the purchase of 20 drugs from either manufacturers or wholesalers for 21 the staff model HMO? 22 A. Yes.</p> | <p>10 1 Q. Uh-huh. And to your recollection, what 2 was the range of percentages markup or discount off 3 of WAC at which Harvard acquired drugs from 4 manufacturers for dispensing through its staff 5 model HMO pharmacists? 6 MR. HORGAN: Objection. You can answer. 7 A. 2 percent, to maybe 50, 60 percent. 8 Q. Above or below WAC? 9 MR. HORGAN: Objection. 10 A. Below WAC. 11 Q. With respect to brand name drugs -- let's 12 stick with brand name drugs for a moment. What was 13 the percentage markup or discount off of WAC that 14 Harvard Pilgrim acquired drugs from manufacturers 15 for its staff model HMO? 16 MR. HORGAN: Objection. Can you -- all 17 these are just if you know, all these questions. 18 A. The branded discount was 2 to 50 percent. 19 Q. 2 percent to 50 percent. 20 A. 2 to 50 percent off. 21 Q. Did the discounts off of WAC differ with 22 respect to generic drugs that Harvard purchased on</p> |
| <p>11 1 Q. And what was your involvement? 2 A. My role was to negotiate contracts with 3 those manufacturers that -- how do I phrase it? We 4 didn't really have a central function. So, each 5 pharmacy negotiated a few contracts. 6 Q. Uh-huh. 7 A. That's kind of how it worked. 8 Q. How many pharmacies were -- made up the 9 network of the staff model HMO? 10 A. At that time, I believe it was nine. 11 Q. So, is it correct that in your role over 12 the years as -- in the various pharmacy roles for 13 your staff model HMO, you negotiated purchase 14 contracts with manufacturers for the drugs 15 dispensed through the pharmacy? 16 A. In my role at the staff model, yes. 17 Q. To your recollection, were the prices for 18 the drugs that Harvard purchased from manufacturers 19 set based upon any particular benchmark? 20 MR. HORGAN: During the staff model HMO? 21 MR. HAAS: Yes. 22 A. I would say the benchmark was WAC.</p> | <p>13 1 behalf of its staff model HMO? 2 A. Yes. 3 Q. What were the discounts off of WAC that 4 Harvard Pilgrim received with respect to the 5 general risk purchased from manufacturers for its 6 staff model HMO? 7 A. 50 percent to 80 percent. 8 Q. At that time did Harvard negotiate 9 separate manufacturer rebate agreements with 10 manufacturers for the drugs that were dispensed or 11 administered by the staff model HMO? 12 A. No. 13 Q. Were the rebate -- withdraw that question. 14 Were the discounts off of WAC at which Harvard 15 acquired drugs from manufacturers inclusive of a 16 rebate that pertained to the drugs that were 17 dispensed or administered by the pharmacies -- 18 MR. HORGAN: Objection. 19 Q. -- or the clinics? 20 MR. HORGAN: Objection. 21 A. No. 22 Q. Was it your understanding that at the time</p> |

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14

1 that you were negotiating these prices with
 2 manufacturers for drugs for the staff model HMO
 3 that Harvard Pilgrim was getting a particularly
 4 good price from the manufacturers that wasn't
 5 otherwise available in the marketplace?
 6 MR. HORGAN: Objection.
 7 A. No.
 8 Q. So, to your understanding at the time, any
 9 pharmacy could obtain drugs at between 2 percent to
 10 50 percent or 60 percent off for brand name drugs
 11 from manufacturers, is that correct?
 12 MR. HORGAN: Objection.
 13 A. I don't know.
 14 Q. Was that your understanding at the time?
 15 A. I don't know.
 16 MR. NALVEN: Objection.
 17 A. I don't know what any other pharmacies
 18 were paying.
 19 Q. With respect to the drugs acquired from
 20 wholesalers, was the price for the drugs that
 21 Harvard Pilgrim purchased from wholesalers for the
 22 staff model HMO based on any particular benchmark?

15

1 A. WAC.
 2 Q. Uh-huh. What was the range of discounts
 3 off of WAC or above WAC at which Harvard acquired
 4 brand name drugs from wholesalers?
 5 A. WAC plus 2 percent.
 6 Q. What was the discount above or below WAC
 7 at which Harvard acquired generic drugs from
 8 wholesalers for its staff model HMO?
 9 A. 50 to 80 percent.
 10 Q. Off WAC?
 11 A. Uh-huh.
 12 Q. And again, was it your understanding at
 13 the time that those were market prices that
 14 otherwise would be available in the industry?
 15 MR. NALVEN: Objection.
 16 MR. HORGAN: Objection.
 17 A. Yes.
 18 Q. When you were negotiating with
 19 manufacturers and wholesalers for the purchase of
 20 drugs on behalf of staff model HMO, what was your
 21 understanding of the term "WAC" or wholesale
 22 acquisition cost?

16

1 A. The price that the manufacturer charged
 2 the wholesaler.
 3 Q. Did you have an understanding at the time
 4 whether or not that price was published in any
 5 industry compendia?
 6 A. No.
 7 MR. NALVEN: Object to the form on that
 8 last question, please.
 9 Q. With respect to tracking drug costs or
 10 reimbursement internally at the staff model HMO,
 11 did Harvard Pilgrim track the drugs that were
 12 dispensed to its members based upon a benchmark or
 13 at a cost amount, to your knowledge?
 14 MR. HORGAN: Objection.
 15 A. Cost.
 16 Q. Did there come a point in time that you
 17 became involved in the negotiation of rebates for
 18 manufacturers?
 19 A. Yes.
 20 Q. When was that?
 21 A. 1988.
 22 Q. What was your involvement at that time?

17

1 A. My role was to establish a rebate program
 2 -- or rebate contracts for Harvard Community Health
 3 Plan.
 4 Q. Prior to 1988, did Harvard Community
 5 Health Plan have any rebate program with
 6 manufacturers?
 7 MR. HORGAN: Objection.
 8 A. No.
 9 Q. To your knowledge, prior to 1998, did
 10 Harvard Community Health Plan receive any rebates
 11 through its contract with any pharmacy benefit
 12 manager?
 13 A. I don't know.
 14 Q. Uh-huh.
 15 A. I'm sorry. PBM, no.
 16 Q. At any point in time while you were at
 17 Harvard Community Health Plan, did Harvard
 18 Community contract with a PBM for the
 19 administration of its pharmacy benefit?
 20 A. Could you repeat that question, please.
 21 Q. Yeah. At any time that you worked for
 22 Harvard Pilgrim, has Harvard Pilgrim contracted

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| <p>18</p> <p>1 with a pharmacy benefit manager for the</p> <p>2 administration of its prescription drug benefit for</p> <p>3 drugs administered or dispensed from pharmacies?</p> <p>4 A. Yes.</p> <p>5 Q. What PBMs has Harvard Pilgrim contracted</p> <p>6 with?</p> <p>7 A. Programs & Analysis, PHS. I don't recall</p> <p>8 what it stands for.</p> <p>9 Q. Uh-huh.</p> <p>10 A. Caremark, Pharmacare, MedImpact.</p> <p>11 Q. When did Harvard Community contract with</p> <p>12 Programs & Analysis?</p> <p>13 A. Prior to '88. And to qualify what they</p> <p>14 were, they were a claims processor primarily.</p> <p>15 MR. HORGAN: Just wait for a question.</p> <p>16 He'll ask you what he needs to know.</p> <p>17 Q. What was the terms of the contract with</p> <p>18 Programs & Analysis? When did it start, and when</p> <p>19 did it end -- if it ended?</p> <p>20 A. I don't know.</p> <p>21 Q. Was Programs & Analysis replaced by PHS as</p> <p>22 the PBM of Harvard Community?</p> | <p>20</p> <p>1 the '90s at some point.</p> <p>2 Q. Early '90s, late '90s?</p> <p>3 A. Not sure.</p> <p>4 Q. Uh-huh. Did there come a point in time</p> <p>5 that MedImpact replaced Pharmacare as the PBM of</p> <p>6 Harvard Community Health Plan?</p> <p>7 A. Yes.</p> <p>8 Q. When was that?</p> <p>9 A. Maybe four years ago. So, around 2000.</p> <p>10 Again, not certain of the exact date, but around</p> <p>11 2000.</p> <p>12 Q. Were you involved in any of the processes</p> <p>13 by which Harvard Community Health Plan or later</p> <p>14 Harvard Pilgrim negotiated and entered into</p> <p>15 contracts with any of these PBMs that we've</p> <p>16 mentioned?</p> <p>17 A. PHS.</p> <p>18 Q. Uh-huh. Are you aware of the process that</p> <p>19 Harvard Pilgrim utilized or Harvard Community</p> <p>20 Health Plan utilized to negotiate or determine</p> <p>21 which of the other PBMs is would select at any</p> <p>22 point in time?</p> |
| <p>19</p> <p>1 A. Yes.</p> <p>2 Q. Do you have any idea when that was?</p> <p>3 A. I don't recall the exact date.</p> <p>4 Q. Generally, do you remember when it was?</p> <p>5 A. Around 1990 maybe.</p> <p>6 Q. Did Caremark replace PHS as Harvard</p> <p>7 Community Health Plan's PBM?</p> <p>8 A. They purchased PHS.</p> <p>9 Q. Do you know when that was?</p> <p>10 A. Again, don't recall.</p> <p>11 Q. Generally.</p> <p>12 A. I couldn't even guess. I don't -- I don't</p> <p>13 recall.</p> <p>14 Q. Did there come a point in time that</p> <p>15 Pharmacare replaced Caremark as Harvard Community</p> <p>16 Health Plan's PBM?</p> <p>17 A. Yes.</p> <p>18 Q. When was that?</p> <p>19 A. Again, I don't know the date. I don't</p> <p>20 recall.</p> <p>21 Q. Was it during the '90s?</p> <p>22 A. Yeah. Definitely would have been during</p> | <p>21</p> <p>1 MR. HORGAN: Objection.</p> <p>2 A. Yes, aware of the process.</p> <p>3 MR. COTTON: Off the record.</p> <p>4 (Discussion off the record.)</p> <p>5 Q. From a general perspective, does Harvard</p> <p>6 Pilgrim and Harvard Community engage in a bidding</p> <p>7 process in order to determine which PBM it will</p> <p>8 select?</p> <p>9 MR. HORGAN: Objection.</p> <p>10 A. Yes.</p> <p>11 Q. Going back to your involvement in the</p> <p>12 rebating process beginning in 1998, can you please</p> <p>13 describe for me what that was.</p> <p>14 A. Negotiated with manufacturers for rebate</p> <p>15 contracts on products.</p> <p>16 Q. Did anyone else work with you in</p> <p>17 establishing this rebating function at Harvard?</p> <p>18 A. Yes.</p> <p>19 Q. Who else worked with you?</p> <p>20 A. Ken -- Kenneth Kazarosian.</p> <p>21 Q. Okay. Anyone else?</p> <p>22 A. No.</p> |

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| <p style="text-align: right;">22</p> <p>1 Q. How did you go about establishing the</p> <p>2 rebate program?</p> <p>3 A. Just met with manufacturers and requested</p> <p>4 rebate contracts.</p> <p>5 Q. Uh-huh. Did you do any analysis at the</p> <p>6 time whether it be more effective to manage the</p> <p>7 rebate program internally at Harvard Pilgrim,</p> <p>8 rather than, say, externally through a PBM?</p> <p>9 A. No.</p> <p>10 Q. Did there ever come a point in time when</p> <p>11 you did that analysis to determine whether or not</p> <p>12 it would be better from Harvard Pilgrim's</p> <p>13 perspective to manage the rebate function</p> <p>14 internally or to do it outside through a PBM?</p> <p>15 A. Yes.</p> <p>16 Q. When did you do that?</p> <p>17 A. I did that when we converted to Pharmicare</p> <p>18 as the PBM.</p> <p>19 Q. Did you engage in a similar process when</p> <p>20 MedImpact became Harvard's PBM?</p> <p>21 A. No.</p> <p>22 Q. Did you conclude, through your analysis of</p> | <p style="text-align: right;">24</p> <p>1 dispensing fees associated with the drug?</p> <p>2 A. I don't recall.</p> <p>3 Q. And you said it included the rebates --</p> <p>4 A. Uh-huh.</p> <p>5 Q. -- for manufacturers? Was there anything</p> <p>6 else that was included in that cost?</p> <p>7 A. Not that I recall.</p> <p>8 Q. Was any consideration given to any other</p> <p>9 incentives provided by the pharmacy benefit manager</p> <p>10 at that time?</p> <p>11 A. No.</p> <p>12 Q. Aside from Pharmicare, did any other of</p> <p>13 the PBMs that were competing for Harvard's business</p> <p>14 submit a similar analysis?</p> <p>15 MR. NALVEN: Objection.</p> <p>16 A. Not that I recall, no.</p> <p>17 Q. So, is it fair to say that at that time</p> <p>18 Harvard Pilgrim was considering whether to delegate</p> <p>19 the rebate function to Pharmicare, but based upon</p> <p>20 its economic analysis, concluded that it would</p> <p>21 retain that function internally?</p> <p>22 MR. HORGAN: Objection.</p> |
| <p style="text-align: right;">23</p> <p>1 the relative effectiveness of managing the rebate</p> <p>2 program internally versus through a PBM, that it</p> <p>3 would be more effective for Harvard to manage the</p> <p>4 rebating program internally than through</p> <p>5 Pharmicare?</p> <p>6 MR. NALVEN: Objection to form.</p> <p>7 MR. HORGAN: Objection.</p> <p>8 A. Yes.</p> <p>9 Q. Okay. What sort of information did you</p> <p>10 use in making that analysis in reaching that</p> <p>11 conclusion?</p> <p>12 MR. NALVEN: Objection.</p> <p>13 A. We took a basket of drugs, we calculated</p> <p>14 our net cost for that basket of drugs, and the PBM</p> <p>15 did the same.</p> <p>16 Q. Uh-huh. When you say, "net cost," what</p> <p>17 were the components of the net cost?</p> <p>18 A. That was the cost after rebates.</p> <p>19 Q. Uh-huh. Did it include the ingredient</p> <p>20 cost of the drug?</p> <p>21 A. Yes.</p> <p>22 Q. Did it include any servicing fees or</p> | <p style="text-align: right;">25</p> <p>1 A. Yes.</p> <p>2 Q. And again, to your knowledge, has Harvard</p> <p>3 Pilgrim done such an analysis at any other point in</p> <p>4 time?</p> <p>5 MR. NALVEN: Note my objection, please.</p> <p>6 A. I don't recall that we have.</p> <p>7 Q. So, when you set up the Harvard rebate</p> <p>8 program in 1998, did you enter into contracts with</p> <p>9 manufacturers at that time?</p> <p>10 A. Yes.</p> <p>11 Q. How were the rebates that Harvard Pilgrim</p> <p>12 was to get under those contracts calculated, to</p> <p>13 your recollection?</p> <p>14 A. They were a discount off of WAC.</p> <p>15 Q. Do you recall what the range of discounts</p> <p>16 off of WAC that Harvard Pilgrim received on those</p> <p>17 contracts?</p> <p>18 MR. NALVEN: Objection.</p> <p>19 A. 1 percent to 90 percent.</p> <p>20 Q. On what drugs did Harvard Pilgrim receive</p> <p>21 a rebate of up to 90 percent?</p> <p>22 MR. HORGAN: Objection.</p> |

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| <p>26</p> <p>1 A. Generics.</p> <p>2 Q. At that time did you give any</p> <p>3 consideration to basing the rebate calculation off</p> <p>4 of AWP instead of WAC?</p> <p>5 MR. HORGAN: Objection. At what time?</p> <p>6 Q. At the time they created the rebate</p> <p>7 program in 1988 -- '98. Are you talking 1998 or</p> <p>8 1988?</p> <p>9 A. '88.</p> <p>10 Q. 1988.</p> <p>11 A. Can you repeat that question.</p> <p>12 Q. Sure. At the time that you established</p> <p>13 the Harvard rebate program in 1988, did you give</p> <p>14 any consideration to calculating the rebates from</p> <p>15 manufacturers off of an AWP rather than off of WAC?</p> <p>16 A. The -- no.</p> <p>17 Q. Did you request from manufacturers any</p> <p>18 bids or proposals with respect to the rebates they</p> <p>19 were willing to offer?</p> <p>20 A. Yes.</p> <p>21 MR. HORGAN: Objection.</p> <p>22 Q. How did that process work?</p> | <p>28</p> <p>1 formulary status?</p> <p>2 MR. HORGAN: Objection.</p> <p>3 A. If that status existed.</p> <p>4 Q. And when would that status exist?</p> <p>5 A. When our pharmacy committee had made a</p> <p>6 decision to put a drug on the formulary.</p> <p>7 Q. Is it fair to say that situation would</p> <p>8 exist wherever there was otherwise clinically</p> <p>9 equivalent and efficacious drugs?</p> <p>10 MR. HORGAN: Objection.</p> <p>11 A. No.</p> <p>12 Q. No. In a situation where you had</p> <p>13 otherwise clinically, efficacious, and safe drugs,</p> <p>14 when wouldn't the proposal to provide preferential</p> <p>15 or access to the formulary exist?</p> <p>16 MR. HORGAN: Objection.</p> <p>17 A. I'm not sure I understand the question.</p> <p>18 Q. I asked you whether this happens --</p> <p>19 whether there's always a situation where you could</p> <p>20 provide or Harvard Pilgrim would provide</p> <p>21 preferential formulary status to otherwise</p> <p>22 functionally-equivalent drugs?</p> |
| <p>27</p> <p>1 A. We'd meet with a representative of the</p> <p>2 company and asked them for a rebate contract on one</p> <p>3 of their products.</p> <p>4 Q. Uh-huh. Did you determine, before meeting</p> <p>5 with the manufacturers, which otherwise</p> <p>6 functionally-equivalent drugs were the competitors</p> <p>7 of that manufacturer?</p> <p>8 A. Yes.</p> <p>9 Q. And for all those competitive drugs, did</p> <p>10 you request manufacturers of those drugs to submit</p> <p>11 proposals with respect to the rebates they were</p> <p>12 willing to offer?</p> <p>13 MR. HORGAN: Objection.</p> <p>14 A. I can't say for sure if it was done every</p> <p>15 time.</p> <p>16 Q. Let me ask it slightly differently. In</p> <p>17 connection with requesting rebates from</p> <p>18 manufacturers, did you offer, as a quid pro quo, a</p> <p>19 formulary access or a preferred formulary listing?</p> <p>20 MR. HORGAN: Objection.</p> <p>21 A. Sometimes, yes.</p> <p>22 Q. In what circumstances would you offer that</p> | <p>29</p> <p>1 A. Uh-huh.</p> <p>2 Q. And you indicated it didn't always happen.</p> <p>3 A. Uh-huh.</p> <p>4 Q. So, my question is, when didn't it happen?</p> <p>5 MR. HORGAN: Objection.</p> <p>6 A. When the drugs were unique.</p> <p>7 Q. Right. Other than the situations in which</p> <p>8 the drugs are otherwise unique, i.e., when the</p> <p>9 drugs are otherwise functionally equivalent --</p> <p>10 A. Okay.</p> <p>11 Q. -- was there any situation where Harvard</p> <p>12 Pilgrim did not offer some preferred formulary</p> <p>13 listing in exchange for rebates?</p> <p>14 MR. HORGAN: Objection.</p> <p>15 A. I would say, yes.</p> <p>16 Q. What circumstances wouldn't Harvard</p> <p>17 Pilgrim offer a preferred formulary listing for</p> <p>18 otherwise functionally-equivalent drugs?</p> <p>19 MR. HORGAN: Objection.</p> <p>20 A. At that time, some manufacturers would</p> <p>21 contract even though the drug wasn't in a preferred</p> <p>22 position or have a -- you know, be on the</p> |

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| <p style="text-align: right;">30</p> <p>1 formulary.</p> <p>2 Q. What was your understanding at the time as</p> <p>3 to the reason why the manufacturers would contract</p> <p>4 in that situation?</p> <p>5 MR. HORGAN: Objection.</p> <p>6 A. To get information data, claims data back</p> <p>7 on the products.</p> <p>8 Q. Uh-huh. So, as a quid pro quo for</p> <p>9 providing claims data to the manufacturers, the</p> <p>10 manufacturers would provide rebates to Harvard</p> <p>11 Pilgrim, is that correct?</p> <p>12 MR. HORGAN: Objection.</p> <p>13 A. I don't know.</p> <p>14 Q. Well, when you said, "in exchange for</p> <p>15 claims data," what are you referring to?</p> <p>16 A. Pharmacy claims data. There may be a</p> <p>17 reason. I don't know. I don't know their ultimate</p> <p>18 reason.</p> <p>19 Q. Where would they be getting pharmacy</p> <p>20 claims data from?</p> <p>21 MR. HORGAN: Objection.</p> <p>22 A. From our PBM. Well, actually, from me,</p> | <p style="text-align: right;">32</p> <p>1 the data and then calculate the rebates due,</p> <p>2 prepare an invoice. In the past, it was all done</p> <p>3 manually.</p> <p>4 Q. Uh-huh. Does Harvard Pilgrim retain</p> <p>5 complete control over its formulary?</p> <p>6 A. Yes.</p> <p>7 Q. Has it -- Harvard Pilgrim ever considered</p> <p>8 delegating that responsibility or that control to a</p> <p>9 PBM?</p> <p>10 MR. HORGAN: Objection.</p> <p>11 A. I don't know.</p> <p>12 Q. From your perspective, does Harvard</p> <p>13 Pilgrim have the ability to control which of</p> <p>14 otherwise functionally-equivalent drugs are</p> <p>15 dispensed by pharmacies --</p> <p>16 MR. HORGAN: Objection.</p> <p>17 Q. -- through its formulary?</p> <p>18 A. Define "control."</p> <p>19 Q. Influence the drugs that are dispensed by</p> <p>20 the pharmacies.</p> <p>21 MR. HORGAN: Objection.</p> <p>22 A. Yes.</p> |
| <p style="text-align: right;">31</p> <p>1 but the data comes from the PBM.</p> <p>2 Q. So, in other words, in order to calculate</p> <p>3 the amount of rebate Harvard Pilgrim would provide</p> <p>4 the claims data to the manufacturers, is that</p> <p>5 correct?</p> <p>6 MR. HORGAN: Objection.</p> <p>7 A. That's correct.</p> <p>8 Q. How has the Harvard Pilgrim rebate program</p> <p>9 changed over time since 1988?</p> <p>10 MR. NALVEN: Objection. The basis for the</p> <p>11 objection is Harvard Pilgrim in 1988.</p> <p>12 Q. Uh-huh. Okay. When I refer to "Harvard</p> <p>13 Pilgrim," I'm referring to Harvard Pilgrim Health</p> <p>14 Plan's current entity, as well as its successors.</p> <p>15 That would include Harvard Community. Okay. With</p> <p>16 that said, you can answer the question.</p> <p>17 A. The only substantive change is to automate</p> <p>18 the process.</p> <p>19 Q. Uh-huh. When you say, "automate the</p> <p>20 process," what do you mean?</p> <p>21 A. We have a contract system. We can load</p> <p>22 the contract in, and the contract system will take</p> | <p style="text-align: right;">33</p> <p>1 Q. Have you been involved at all in</p> <p>2 contracting with either manufacturers or pharmacies</p> <p>3 or hospitals or physicians at an amount that is set</p> <p>4 based -- in whole or part -- based on AWP?</p> <p>5 A. Yes.</p> <p>6 Q. In what context have you been involved in</p> <p>7 that?</p> <p>8 A. Negotiations with pharmacies.</p> <p>9 Q. What is your involvement with pharmacy</p> <p>10 negotiations?</p> <p>11 A. I negotiate the specialty pharmacy</p> <p>12 contracts for Harvard Pilgrim.</p> <p>13 Q. When did Harvard Pilgrim first enter into</p> <p>14 a specialty pharmacy contract?</p> <p>15 MR. HORGAN: Objection.</p> <p>16 A. I believe the date would be October 1st,</p> <p>17 2002.</p> <p>18 Q. Is that with the Accredo --</p> <p>19 MR. HORGAN: Objection.</p> <p>20 A. Yeah, that would be with the Accredo.</p> <p>21 Q. What was the impetus for Harvard Pilgrim</p> <p>22 to enter into the contract with Accredo in October</p> |

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| <p>34</p> <p>1 2002?</p> <p>2 MR. HORGAN: Objection.</p> <p>3 A. The desire to better manage high-cost</p> <p>4 injectable products.</p> <p>5 Q. How would entering into a contract with a</p> <p>6 special pharmacy allow Harvard Pilgrim to do that?</p> <p>7 A. They had the most experience and</p> <p>8 familiarity with these types of products.</p> <p>9 Q. So, how did the experience of the</p> <p>10 specialty pharmacies allow Harvard Pilgrim to</p> <p>11 control their costs?</p> <p>12 A. They provided patient care services for</p> <p>13 select products -- case management, if you will,</p> <p>14 compliance programs.</p> <p>15 Q. How did the specialty pharmacy contract</p> <p>16 that Harvard entered into with Accredo -- did</p> <p>17 Accredo supply drugs to physicians for</p> <p>18 administration to Harvard members on an as-needed</p> <p>19 basis?</p> <p>20 MR. HORGAN: Objection.</p> <p>21 A. Yes.</p> <p>22 Q. So, under that program, is it fair to say</p> | <p>36</p> <p>1 A. Same time. Freedom Drug.</p> <p>2 Q. When was that?</p> <p>3 A. I believe that was January of '03.</p> <p>4 Q. Uh-huh.</p> <p>5 A. And Village Pharmacy.</p> <p>6 Q. Is that Brookline Village Apothecary?</p> <p>7 A. That's correct. Also the same time as</p> <p>8 Freedom, January of '03.</p> <p>9 Q. Is it fair to say the Accredo and</p> <p>10 CuraScript contracts covered injectable drugs, and</p> <p>11 the Freedom and Brookline Village Apothecaries</p> <p>12 covered infertility drugs?</p> <p>13 MR. HORGAN: Objection.</p> <p>14 A. No.</p> <p>15 Q. Okay. Why did Harvard Pilgrim enter into</p> <p>16 contracts with four specialty pharmacy providers?</p> <p>17 A. Based on expertise.</p> <p>18 Q. What were the differing expertise of the</p> <p>19 four specialty pharmacies?</p> <p>20 A. Village and Freedom specialized in</p> <p>21 infertility. And the other two were broad</p> <p>22 service -- multiple products, multiple categories.</p> |
| <p>35</p> <p>1 that the physician would never take title to the</p> <p>2 drug that was administered to the Pilgrim member?</p> <p>3 MR. HORGAN: Objection.</p> <p>4 A. Can you define what you mean by "take</p> <p>5 title"?</p> <p>6 Q. Let me ask it differently. When Harvard</p> <p>7 Pilgrim provided reimbursement for drugs that were</p> <p>8 administered to its members and acquired from a</p> <p>9 specialty pharmacy, who -- what entity did Harvard</p> <p>10 Pilgrim reimburse?</p> <p>11 A. The specialty pharmacy.</p> <p>12 Q. So, when you say that the contract with</p> <p>13 the specialty pharmacies were based on AWP, the</p> <p>14 contracts were providing for reimbursement by</p> <p>15 Harvard Pilgrim to the specialty pharmacy at an</p> <p>16 amount based upon AWP, is that right?</p> <p>17 A. That's correct.</p> <p>18 Q. What other specialty pharmacy contracts</p> <p>19 has Harvard Pilgrim entered into aside from the</p> <p>20 Accredo contract in October 2002?</p> <p>21 A. CuraScript.</p> <p>22 Q. When was that?</p> | <p>37</p> <p>1 Q. Did -- withdraw that. Why did Harvard</p> <p>2 Pilgrim enter into contracts with two different</p> <p>3 specialty pharmacy providers for the provision of a</p> <p>4 broad range of drugs?</p> <p>5 A. To allow for overlap in the event of a</p> <p>6 service problem with one provider.</p> <p>7 Q. Would the same rationale apply with</p> <p>8 respect to entering into two contracts, one with</p> <p>9 Freedom, and the other with Brookline Village</p> <p>10 Apothecary for fertility drugs?</p> <p>11 A. Yes.</p> <p>12 Q. What was the process by which you entered</p> <p>13 into the contracts with Accredo and CuraScript?</p> <p>14 Was it a bidding process?</p> <p>15 A. Yes.</p> <p>16 Q. Did Harvard Pilgrim send out an RFP?</p> <p>17 A. Yes.</p> <p>18 Q. How many responses did it get?</p> <p>19 A. I don't recall the exact number. On</p> <p>20 specialty, it was somewhere around 20.</p> <p>21 Q. Uh-huh. Of the 20 responses to the</p> <p>22 request for a proposal for specialty pharmacy</p> |

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| <p style="text-align: right;">38</p> <p>1 contracts in October of 2002, what led Harvard 2 Pilgrim to eventually contract with Accredo and 3 CuraScript? 4 A. It was the delivery model, service model, 5 the care management services, and the contract 6 pricing. 7 Q. Uh-huh. In connection with this bidding 8 process, did you compare those attributes across 9 all the 20 candidates? 10 MR. HORGAN: Objection. 11 A. Yes. 12 Q. And were any of the other 20 candidates 13 cheaper with respect to the ultimate contract 14 pricing, but not as satisfactory with respect to 15 the other elements of the response? 16 A. I don't recall. 17 Q. Did Harvard Pilgrim engage in the same 18 bidding process with respect to the fertility 19 contracts it entered into in January 2003? 20 A. Yes. 21 Q. Do you recall how many responses to 22 Harvard Pilgrim's request for a proposal were</p> | <p style="text-align: right;">40</p> <p>1 face to be between Freedom Drug and Harvard Pilgrim 2 Health Care. It's Bates stamped HPH 417 through 3 439. And the fourth is an agreement that, on its 4 face, states, "Pharmacy Services Agreement." It 5 purports to be Brookline Village Apothecary, Inc. 6 and Harvard Pilgrim Health Care. It's Bates 7 stamped 398 through 416. 8 And for the record, Deposition Exhibit No. 9 1 also includes a series of amendments that are 10 annexed to the Accredo Pharmacy agreement. 11 Q. Mr. Kenney, I'd ask that you take a look 12 at the documents that have been marked as Harvard 13 Pilgrim Deposition Exhibits 1, 2, 3, and 4, and 14 tell me whether you're familiar with them. And if 15 so, what they are. 16 MR. HORGAN: Take your time. 17 A. (Witness reviews document.) Okay. I'm 18 ready for your question again, please. 19 Q. Are you familiar with those documents? 20 A. Yes. 21 Q. What are they? 22 A. These are the contracts that I negotiated</p> |
| <p style="text-align: right;">39</p> <p>1 received at that time? 2 A. Three. 3 Q. Who was the third? 4 A. IVP Care. 5 MR. HAAS: Okay. I'm going to mark a 6 series of contracts now as Harvard Pilgrim 7 Deposition Exhibits 1, 2 and 3 for the record. 8 (Discussion off the record.) 9 (Recess was taken.) 10 (HPH 449-489 marked Exhibit Kenney 001) 11 (HPH 490-535 marked Exhibit Kenney 002) 12 (HPH 417-439 marked Exhibit Kenney 003) 13 (HPH 398-416 marked Exhibit Kenney 004) 14 Q. We've marked as Harvard Pilgrim Deposition 15 Exhibits 1, 2, 3, and 4 a series of agreements. 16 The first is a document titled, "Accredo Pharmacy 17 Services Agreement." It's Bates stamped HPH 449 18 through 489. 19 The second is a document titled, 20 "CuraScript Pharmacies Agreement." It's Bates 21 stamped 490 through 535. The third is a document 22 entitled, "Pharmacy Agreement." It purports on its</p> | <p style="text-align: right;">41</p> <p>1 with each of the four parties here, Accredo, 2 CuraScript, Freedom, Brookline Village Apothecary. 3 Q. Uh-huh. Starting with the Accredo 4 contract, which we've marked as Harvard Pilgrim 5 Deposition Exhibit No. 1, does that agreement show 6 the rates at which Harvard Pilgrim agreed to 7 reimburse Accredo for drugs supplied to physicians 8 under this agreement? 9 A. Yes. 10 Q. Where does it show that? I'll refer you 11 to HPH 461, if that helps you. 12 A. The Schedule I, I believe, of the contract 13 specifies what we will reimburse Accredo for the 14 products. And it's -- whether or not it's shipped 15 to the patient or the physician we pay the same 16 rate for a drug. 17 Q. Uh-huh. 18 MR. NALVEN: Note my objection to the 19 phrase, "supplied to the physician" in the prior 20 question. 21 Q. In Schedule I there's a table with a 22 series of drugs listed, and toward the right of the</p> |

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| <p style="text-align: right;">42</p> <p>1 table there is a column with percentages, which is</p> <p>2 the fourth column from the right. And then the</p> <p>3 second column to the right, there's another column</p> <p>4 with percentages. I just can't read the top of</p> <p>5 that column. Can you tell me what those two</p> <p>6 columns represent in this table?</p> <p>7 A. Yes.</p> <p>8 Q. What do they represent?</p> <p>9 A. The fourth column in from the right is a</p> <p>10 preferred discount rate. And the second column in</p> <p>11 from the right is an exclusive discount rate.</p> <p>12 Q. What is a preferred discount rate as</p> <p>13 differentiated from exclusive discount rate?</p> <p>14 A. Preferred would be not the only supplier</p> <p>15 of specialty pharmacies to Harvard Pilgrim.</p> <p>16 Q. So, to the extent that any of these drugs</p> <p>17 in this column are also supplied by another</p> <p>18 specialty pharmacist, i.e., CuraScript, then is it</p> <p>19 correct that Accredo would receive reimbursement</p> <p>20 only under the -- at the rates in the column that</p> <p>21 is entitled, "Preferred discount rate"?</p> <p>22 MR. HORGAN: Objection.</p> | <p style="text-align: right;">44</p> <p>1 for any of these.</p> <p>2 Q. With respect to the drugs listed on the</p> <p>3 first page then, is it correct that they would be</p> <p>4 reimbursed at the rate set forth in the second</p> <p>5 column from the right, which is, I believe you</p> <p>6 mentioned, the exclusive discount rate?</p> <p>7 A. I'm not sure.</p> <p>8 Q. Now, with respect to these rates that are</p> <p>9 reflected in these two columns, what are they</p> <p>10 percentages of, and what do they represent?</p> <p>11 A. They represent a discount off of AWP.</p> <p>12 Q. Were these reimbursement discount rates,</p> <p>13 i.e., discounts for the AWP, set through the</p> <p>14 competitive bidding process that you described</p> <p>15 earlier?</p> <p>16 MR. NALVEN: Objection to form.</p> <p>17 A. (Witness reviews document.)</p> <p>18 MR. HORGAN: Do you still have his</p> <p>19 question in mind?</p> <p>20 THE WITNESS: Yeah, I do.</p> <p>21 A. The answer is no.</p> <p>22 Q. How were those rates set?</p> |
| <p style="text-align: right;">43</p> <p>1 A. No.</p> <p>2 Q. Okay. Can you explain to me how that</p> <p>3 works.</p> <p>4 A. It's a pricing schedule based on how many</p> <p>5 specialty pharmacies we do business with. So,</p> <p>6 since we have more than one, we would refer to the</p> <p>7 preferred column for pricing. If we were exclusive</p> <p>8 with Accredo, we would refer to the exclusive.</p> <p>9 Q. One follow-up question in that regard:</p> <p>10 Are there any of these drugs in this table for</p> <p>11 which Accredo is the exclusive distributor --</p> <p>12 withdraw that. Are there any drugs listed in this</p> <p>13 table for which Accredo is the exclusive specialty</p> <p>14 pharmacy for Harvard Pilgrim?</p> <p>15 A. Yes.</p> <p>16 Q. Which ones?</p> <p>17 A. Synergyst, all the growth hormones, which</p> <p>18 are all the products in the second column that are</p> <p>19 shown as "growth disorders --" actually, all</p> <p>20 products on the first page, Accredo is the</p> <p>21 exclusive specialty for those products. On the</p> <p>22 second page, I'm not certain if they're exclusive</p> | <p style="text-align: right;">45</p> <p>1 A. They were negotiated with each supplier</p> <p>2 after we determined they could meet the first two</p> <p>3 criteria I gave you as to why we would look for a</p> <p>4 specialty supplier --</p> <p>5 Q. Uh-huh.</p> <p>6 A. -- which was business service model, and</p> <p>7 case management/care management capability.</p> <p>8 Q. Were those rates negotiated prior to the</p> <p>9 time that a specialty pharmacy provider was</p> <p>10 selected?</p> <p>11 A. No, we didn't negotiate the final rate</p> <p>12 till we selected the finals.</p> <p>13 Q. Uh-huh. Let me back up then so we make</p> <p>14 sure the record is clear. With respect to the</p> <p>15 bidding process we discussed earlier whereby</p> <p>16 Harvard Pilgrim selected two specialty pharmacists</p> <p>17 out of a list of 20 to be its providers in October</p> <p>18 of 2002, were the costs that the specialty</p> <p>19 pharmacies would charge Harvard Pilgrim for the</p> <p>20 drugs supplied to the doctors for administration to</p> <p>21 Harvard Pilgrim's members a factor in deciding</p> <p>22 which pharmacy to contract with?</p> |

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| <p>46</p> <p>1 MR. HORGAN: Objection.</p> <p>2 A. Yes.</p> <p>3 Q. What disclosures did the pharmacies make</p> <p>4 to Harvard Pilgrim in connection with that process?</p> <p>5 A. We requested a pricing proposal with their</p> <p>6 RFP response.</p> <p>7 Q. How did the pricing proposal differ, if at</p> <p>8 all, from the rates that were eventually negotiated</p> <p>9 and formed the basis for Schedule I to the exhibit</p> <p>10 marked as Deposition Exhibit No. 1?</p> <p>11 MR. HORGAN: Objection.</p> <p>12 A. Select products were renegotiated at</p> <p>13 different rates --</p> <p>14 Q. Uh-huh.</p> <p>15 A. -- after the original submission.</p> <p>16 Q. What percentage, roughly, of the drugs</p> <p>17 listed here had prices or reimbursement rates that</p> <p>18 were renegotiated after the bid was awarded?</p> <p>19 MR. HORGAN: Objection.</p> <p>20 A. Less than 5 percent.</p> <p>21 Q. Okay. So, it's fair to say for 95 percent</p> <p>22 of these drugs the reimbursement rate was set or</p> | <p>48</p> <p>1 foundational question, Were there any generics on</p> <p>2 there? And he said there were not. So, that's why</p> <p>3 I asked it in general terms.</p> <p>4 Q. But you may answer.</p> <p>5 A. (Witness reviews document.) Yes, that's</p> <p>6 correct.</p> <p>7 Q. Is there any way to -- back up. Under</p> <p>8 this agreement, has Accredo supplied any generic</p> <p>9 drugs to physicians that have been administered to</p> <p>10 Harvard Pilgrim's members?</p> <p>11 MR. HORGAN: Objection.</p> <p>12 A. I don't know.</p> <p>13 Q. Is there any way of telling today whether</p> <p>14 or not the generics that Accredo has provided to</p> <p>15 Harvard Pilgrim's members under this agreement, if</p> <p>16 any, were reimbursed at Accredo's usual and</p> <p>17 customary charge or at MAC price?</p> <p>18 MR. HORGAN: Objection.</p> <p>19 A. I'd have to look at detailed claims.</p> <p>20 Q. Is there any other way of making that</p> <p>21 determination other than looking at the detailed</p> <p>22 claims data?</p> |
| <p>47</p> <p>1 determined through the competitive bidding process</p> <p>2 we discussed earlier, correct?</p> <p>3 A. Yes.</p> <p>4 MR. NALVEN: Note my objection.</p> <p>5 Q. Are any of these drugs listed on Schedule</p> <p>6 I generics?</p> <p>7 A. (Witness reviews document.) No.</p> <p>8 Q. Under this agreement, is it accurate that</p> <p>9 any generic drugs that were dispensed to --</p> <p>10 withdraw the question. Under this agreement, is it</p> <p>11 accurate that any generic drugs that were supplied</p> <p>12 by Accredo to physicians for administration to</p> <p>13 Harvard Pilgrim's members would be reimbursed at</p> <p>14 the lesser of Accredo's usual and customary charge</p> <p>15 for MAC plus a dispensing fee?</p> <p>16 MR. HORGAN: Objection. Are you referring</p> <p>17 to something in the contract?</p> <p>18 A. If you want to reference what I'm looking</p> <p>19 at, it's on HPH 459, at the bottom of the page.</p> <p>20 MR. HAAS: But I asked it more generally,</p> <p>21 because it makes reference to what is on Schedule I</p> <p>22 and what are versus what was not. I asked a</p> | <p>49</p> <p>1 MR. HORGAN: Objection.</p> <p>2 A. No.</p> <p>3 Q. What is your understanding of the term</p> <p>4 "MAC"?</p> <p>5 A. It stands for maximum allowable cost.</p> <p>6 Q. Uh-huh. And as used in this agreement,</p> <p>7 when it refers to the PBM's MAC on page HPH 459,</p> <p>8 what is that referring to?</p> <p>9 A. It refers to a MAC price that is set for a</p> <p>10 specific generic drug.</p> <p>11 Q. Uh-huh. When it references "the PBM's</p> <p>12 MAC," was Accredo to use a MAC price or a MAC list</p> <p>13 that was set by Harvard Pilgrim's PBM?</p> <p>14 A. Yes.</p> <p>15 Q. Who was the PBM at that time, do you</p> <p>16 recall?</p> <p>17 A. MedImpact.</p> <p>18 Q. Uh-huh. Do you have an understanding of</p> <p>19 how MedImpact set the MAC lists that were utilized</p> <p>20 by Harvard Pilgrim?</p> <p>21 A. I don't know.</p> <p>22 Q. Do you have any idea generally how MAC</p> |

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| <p>50</p> <p>1 lists are created?</p> <p>2 A. Generally, an average pricing of</p> <p>3 generics --</p> <p>4 Q. Uh-huh.</p> <p>5 A. -- based on the more than three suppliers,</p> <p>6 I think -- have to be at least four suppliers. So,</p> <p>7 the average of the AWP's of the generics.</p> <p>8 Q. What is the basis for your understanding</p> <p>9 of how MAC prices are calculated?</p> <p>10 A. Past knowledge of HCFA, MAC pricing,</p> <p>11 definitions from HCFA.</p> <p>12 Q. Is it your understanding that in setting</p> <p>13 the CMS MAC prices that CMS factors into its MAC</p> <p>14 prices a series of variables, one of which is AWP?</p> <p>15 MR. HORGAN: Objection.</p> <p>16 A. I don't know.</p> <p>17 Q. Let me ask it in a better way, because</p> <p>18 that wasn't a very good question. What is your</p> <p>19 understanding of how CMS sets its MAC list?</p> <p>20 A. I don't know.</p> <p>21 MR. HORGAN: Objection.</p> <p>22 A. I don't know.</p> | <p>52</p> <p>1 A. I'm not sure I understand the question.</p> <p>2 Q. Let me ask it differently. Is there a</p> <p>3 particular reason why Harvard Pilgrim didn't set a</p> <p>4 standard reimbursement rate for all drugs</p> <p>5 encompassed by this agreement and the amendments</p> <p>6 thereto?</p> <p>7 MR. HORGAN: Objection.</p> <p>8 A. Yes.</p> <p>9 Q. What was that reason?</p> <p>10 A. Each product was negotiated at its own</p> <p>11 rate with the supplier.</p> <p>12 Q. In setting reimbursement for drugs to the</p> <p>13 specialty pharmacy in 2002 and today, as a discount</p> <p>14 off of AWP, what was your understanding of the term</p> <p>15 "AWP"?</p> <p>16 A. It was the price published by First Data</p> <p>17 Bank.</p> <p>18 Q. Do you understand that AWP was a benchmark</p> <p>19 that was set as a markup over WAC?</p> <p>20 MR. HORGAN: Objection.</p> <p>21 A. No.</p> <p>22 Q. Well, what was your understanding of how</p> |
| <p>51</p> <p>1 Q. That's fair. Have you had any discussions</p> <p>2 with MedImpact or any other PBM with respect to how</p> <p>3 they set their MAC prices or MAC lists?</p> <p>4 A. Not that I recall.</p> <p>5 Q. Uh-huh. What is your understanding of the</p> <p>6 term "usual and customary charge," as used in this</p> <p>7 agreement?</p> <p>8 A. Their normal selling price.</p> <p>9 Q. I ask that you take a look at the Schedule</p> <p>10 I, which we've just been referring to, on Bates</p> <p>11 stamp page HPH 461, as well as the amendment to</p> <p>12 Accredo Pharmacy agreement, dated April 9th, 2004,</p> <p>13 that has a similar but different table that's on</p> <p>14 page Bates stamped HPH 488.</p> <p>15 MR. HAAS: And for the record, I'd just</p> <p>16 note that there is a range of percentage discounts</p> <p>17 listed in these two tables, and my question for the</p> <p>18 witness is --</p> <p>19 Q. -- why is there a range of discounts off</p> <p>20 of AWP provided for the different drugs over time?</p> <p>21 MR. HORGAN: Objection.</p> <p>22 MR. NALVEN: Objection.</p> | <p>53</p> <p>1 AWP was set -- if you have one?</p> <p>2 MR. HORGAN: Objection.</p> <p>3 A. I'm not sure.</p> <p>4 Q. Sitting here today, do you have any</p> <p>5 understanding of how AWP is determined?</p> <p>6 MR. HORGAN: Objection.</p> <p>7 Q. Let me ask a different question. Based</p> <p>8 upon your experience as a purchaser --</p> <p>9 A. Uh-huh.</p> <p>10 Q. -- of drugs for a pharmacy, is it your</p> <p>11 understanding that AWP does not equal the cost at</p> <p>12 which pharmacies can acquire drugs from either</p> <p>13 manufacturers or wholesalers?</p> <p>14 MR. HORGAN: Objection.</p> <p>15 A. I don't know that for sure.</p> <p>16 Q. Uh-huh. Well, based upon your own</p> <p>17 experience, is it fair to say that AWP represents,</p> <p>18 you know, a significant markup over the price at</p> <p>19 which Harvard Pilgrim purchased drugs from</p> <p>20 wholesalers or manufacturers?</p> <p>21 MR. HORGAN: Objection.</p> <p>22 A. Can you define "significant"?</p> |

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15 (Pages 54 to 57)

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| <p style="text-align: right;">54</p> <p>1 Q. Sure. I believe you testified earlier 2 that for brand name drugs Harvard Pilgrim acquired 3 drugs from wholesalers at 2 percent to 4 percent 4 markup. I believe that's right. 5 A. 2 percent. 6 Q. 2 percent markup. So, let me ask the 7 question differently. Is it fair to say that you 8 understood, based upon your experience purchasing 9 drugs from wholesalers, that a 2 percent markup 10 over WAC that AWP represented, typically, for brand 11 name drugs, an 18 to 23 percent markup above that? 12 MR. HORGAN: Objection. 13 Q. Above the price at which Harvard 14 Pilgrim -- 15 A. Yeah, I would -- 16 Q. -- acquired drugs? 17 MR. HORGAN: Objection. 18 A. I would say 14 to 23. 19 Q. And would you agree that range of markup 20 was consistent with respect to most brand name 21 drugs? 22 MR. HORGAN: Objection.</p> | <p style="text-align: right;">56</p> <p>1 why I'm asking it in sort of an indirect way, since 2 you testified you had limited knowledge directly. 3 So, what I'm trying to get is some of the 4 foundations of it. And so, if I am being 5 confusing, that's really fundamentally what I'm 6 trying to do. So, I apologize. 7 Are you aware, from you own personnel 8 experience, whether there has ever been a pharmacy 9 anywhere that has paid AWP for a drug -- for a 10 brand name drug? 11 A. Yes. 12 Q. Where? 13 A. Athol, Massachusetts. 14 Q. Where? 15 A. Athol, Massachusetts. 16 Q. Provide me the context for that. 17 A. I worked as an intern -- 18 Q. Uh-huh. 19 A. -- and they paid AWP for drugs. 20 Q. When was that? 21 A. Give me a minute. 1969, 1970. 22 Q. Okay. Let me go back to your background.</p> |
| <p style="text-align: right;">55</p> <p>1 A. Yes. 2 Q. And based upon your experience contracting 3 with manufacturers on behalf of Harvard Pilgrim, 4 you understood that physicians and pharmacies could 5 acquire discounts and rebates from manufacturers 6 that would significantly lower their costs to well 7 below WAC, right? 8 MR. HORGAN: Objection. 9 A. I don't know that. 10 Q. Well, didn't you testify earlier that in 11 your contracting with manufacturers for the 12 purchase of drugs from manufacturers that you were 13 able to acquire those drugs at amounts 2 percent to 14 50 or 60 percent below WAC for brand name drugs? 15 MR. HORGAN: Objection. 16 A. Yes. 17 MR. HORGAN: I think part of the problem 18 is you're asking him to speak for all pharmacies -- 19 other entities. He's only worked in one. He's 20 testified to -- 21 Q. What I'm trying to explore is really the 22 parameters of your understanding of AWP. That's</p> | <p style="text-align: right;">57</p> <p>1 Can you just walk through -- post high school -- 2 your education and employment history. And give me 3 general terms what the dates were, where you 4 worked, and what your responsibilities were. 5 A. Worked in Brewster's Pharmacy in Athol -- 6 Q. Uh-huh. 7 A. -- as a clerk. Then I went to pharmacy 8 school. I worked there while I was in pharmacy 9 school. 10 Q. Uh-huh. 11 A. Actually, rephrase. I did not work there 12 while I was in pharmacy school. I apologize. I 13 worked at Town Hall Pharmacy in Watertown, 14 Massachusetts while I was in pharmacy school. 15 Q. What was your position there? 16 A. Pharmacy intern. 17 Q. Okay. 18 A. I worked at CVS as a pharmacy intern. I 19 worked at CVS as a registered pharmacist, and then 20 Harvard Community after that. 21 Q. Okay. Aside from the instance you 22 mentioned at Brewster's Pharmacy in Athol when you</p> |

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16 (Pages 58 to 61)

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| <p style="text-align: right;">58</p> <p>1 were a clerk in 1969 or 1970, are you aware of any</p> <p>2 other instance whereby a pharmacy has paid AWP to</p> <p>3 purchase a drug -- a brand name drug?</p> <p>4 A. No.</p> <p>5 MR. HAAS: Off the record.</p> <p>6 (Discussion off the record.)</p> <p>7 Q. Turn with me to a document that's been</p> <p>8 marked as Harvard Pilgrim Deposition Exhibit No. 3.</p> <p>9 It's the contract between Harvard Pilgrim and</p> <p>10 Freedom. Turn with me to Page HPH 426, and you'll</p> <p>11 note Exhibit A titled, "Infertility Medications and</p> <p>12 Pricing," and they have a table at the top that</p> <p>13 says, "Product and AWP Discount," and then below</p> <p>14 they have a product and a fixed reimbursement</p> <p>15 amount. My question is simply this: Do you have</p> <p>16 an understanding as to why Harvard Pilgrim elected</p> <p>17 to reimburse based upon the fixed reimbursement</p> <p>18 around for those particular drugs?</p> <p>19 A. 'Cause they were compounded products.</p> <p>20 Q. What does that mean?</p> <p>21 A. They were prepared and manufactured by the</p> <p>22 pharmacy prior to dispensing.</p> | <p style="text-align: right;">60</p> <p>1 Q. Do you have any -- who is -- withdraw the</p> <p>2 question. Has Harvard Pilgrim contracted with an</p> <p>3 entity known as Chronimed Pharmacy?</p> <p>4 A. Yes.</p> <p>5 Q. What is the nature of that relationship?</p> <p>6 A. I have a contract with Chronimed for -- I</p> <p>7 believe it's for the drug, Fuzeon.</p> <p>8 Q. Is Chronimed another specialty pharmacy?</p> <p>9 A. Yes.</p> <p>10 Q. Was the contracted Chronimed pharmacy</p> <p>11 entered into with a competitive bidding or</p> <p>12 negotiation process?</p> <p>13 A. No.</p> <p>14 Q. How did you arrive at Chronimed as a</p> <p>15 specialty pharmacy for that particular drug?</p> <p>16 A. They were the only pharmacy that could</p> <p>17 dispense that drug.</p> <p>18 Q. As a consequence of -- well, withdraw the</p> <p>19 question. Would you agree with me that because</p> <p>20 Chronimed was the sole provider of Fuzeon, they had</p> <p>21 greater negotiating leverage with Harvard Pilgrim</p> <p>22 with respect to the reimbursement rate that they</p> |
| <p style="text-align: right;">59</p> <p>1 Q. So, why would that lead you to reimburse</p> <p>2 at a fixed amount?</p> <p>3 A. Because they contain multiple ingredients,</p> <p>4 so they couldn't be billed on an electronic claim</p> <p>5 if there were multiple ingredients. So, fixed</p> <p>6 amount facilitated the billing process.</p> <p>7 Q. Are you responsible at all for contracting</p> <p>8 for the mail order services provided to the Harvard</p> <p>9 Pilgrim members?</p> <p>10 A. No.</p> <p>11 Q. Who handles that?</p> <p>12 A. Andrea Grande.</p> <p>13 Q. Do you know who, if any entity, provides</p> <p>14 mail-order services for Harvard Pilgrim members?</p> <p>15 A. I believe it's Scrip Pharmacy.</p> <p>16 Q. Before Scrip Pharmacy, did any other</p> <p>17 entity provide mail order services on behalf of</p> <p>18 Harvard Pilgrim?</p> <p>19 A. Family Meds.</p> <p>20 Q. When did Harvard Pilgrim switch from</p> <p>21 Family Meds to Scrip Pharmacy?</p> <p>22 A. I don't know.</p> | <p style="text-align: right;">61</p> <p>1 requested that they provide?</p> <p>2 MR. NALVEN: Objection.</p> <p>3 MR. HORGAN: Objection.</p> <p>4 A. I don't know.</p> <p>5 Q. Were you involved with negotiations with</p> <p>6 Chronimed?</p> <p>7 A. I was.</p> <p>8 Q. Would you agree with me that Chronimed got</p> <p>9 a relatively -- withdraw that question. Would you</p> <p>10 agree with me or is it fair to say that Chronimed</p> <p>11 -- Cronimed's reimbursement rate for Fuzeon was</p> <p>12 higher than the reimbursement rates afforded to</p> <p>13 Accredo and CuraScript and Brookline and Freedom</p> <p>14 for drugs under their agreement?</p> <p>15 MR. HORGAN: Objection.</p> <p>16 A. I mean, I don't know.</p> <p>17 MR. HAAS: Let's mark as Harvard Pilgrim</p> <p>18 Deposition Exhibit No. 5 a document Bates stamped</p> <p>19 HPH 536 through 544.</p> <p>20 (HPH 536-544 marked Exhibit Kenney 005)</p> <p>21 Q. I ask that you take a look at what's been</p> <p>22 marked as Harvard Pilgrim Deposition Exhibit No. 5,</p> |

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17 (Pages 62 to 65)

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| <p style="text-align: right;">62</p> <p>1 and tell me if you're familiar with the document.</p> <p>2 And if so, what it is.</p> <p>3 A. (Witness reviews document.) This is an</p> <p>4 agreement between Harvard Pilgrim and Chronimed to</p> <p>5 supply Fuzeon.</p> <p>6 Q. What was the reimbursement rate at which</p> <p>7 Harvard Pilgrim agreed to reimburse Chronimed for</p> <p>8 Fuzeon supplied to doctors for administration to</p> <p>9 Harvard Pilgrim members?</p> <p>10 A. This product is self-administered. I</p> <p>11 don't believe it goes to doctors, although I'm not</p> <p>12 sure.</p> <p>13 Q. Okay. What was the reimbursement rate at</p> <p>14 which Harvard Pilgrim agreed to reimburse Chronimed</p> <p>15 for Fuzeon?</p> <p>16 A. AWP minus 12 percent.</p> <p>17 Q. Uh-huh. Fair enough. Do you recall at</p> <p>18 all how that particular reimbursement rate was set?</p> <p>19 A. I requested a reimbursement rate. They</p> <p>20 submitted a rate, and we signed a contract.</p> <p>21 Q. Was there any negotiation over that rate?</p> <p>22 A. No.</p> | <p style="text-align: right;">64</p> <p>1 Exhibits 1 through 5 in this matter?</p> <p>2 A. Yes.</p> <p>3 Q. Do you recall also producing a one-page</p> <p>4 letter from ESI Specialty Services?</p> <p>5 A. Yes.</p> <p>6 Q. Were those documents all executed by</p> <p>7 Harvard Pilgrim in the regular course of business?</p> <p>8 A. Yes.</p> <p>9 Q. Do you maintain copies of all those</p> <p>10 documents in the regular course of business?</p> <p>11 A. Yes.</p> <p>12 MR. HAAS: I'll turn the questioning over</p> <p>13 to Plaintiffs' counsel now, reserving my right for</p> <p>14 follow-up.</p> <p>15 CROSS-EXAMINATION</p> <p>16 BY MR. NALVEN:</p> <p>17 Q. Good morning, Mr. Kenney. My name is</p> <p>18 David Nalven, and I represent the Plaintiffs in</p> <p>19 this action. You began work with Harvard Community</p> <p>20 Health Plan in what year?</p> <p>21 A. 1980.</p> <p>22 Q. Who is your current employer?</p> |
| <p style="text-align: right;">63</p> <p>1 Q. Did Harvard Pilgrim also enter into a</p> <p>2 specialty distribution services relationship with</p> <p>3 ESI Express Scripts?</p> <p>4 A. We did, yes.</p> <p>5 Q. And was that a contract for the</p> <p>6 reimbursement of the drug Prolastin and Somavert?</p> <p>7 A. Yes.</p> <p>8 Q. Is it accurate that under that agreement</p> <p>9 Harvard Pilgrim agreed to reimburse Express Script</p> <p>10 an amount of AWP minus 10 percent for Prolastin and</p> <p>11 Somavert supplied by Express Scripts to Harvard</p> <p>12 Pilgrim members?</p> <p>13 A. I don't recall the exact rate.</p> <p>14 Q. Uh-huh. Mr. Kenney, were you involved at</p> <p>15 all in the collection of documents that were</p> <p>16 produced to Defendants in this matter?</p> <p>17 A. Yes.</p> <p>18 Q. What was your involvement?</p> <p>19 A. I had a request from our attorneys to</p> <p>20 produce copies of specialty pharmacy agreements.</p> <p>21 Q. Uh-huh. And do you recall producing the</p> <p>22 documents that have been marked as Deposition</p> | <p style="text-align: right;">65</p> <p>1 A. Harvard Pilgrim Health Care.</p> <p>2 Q. And when did Harvard Pilgrim Health Care</p> <p>3 become your employer?</p> <p>4 A. I don't remember the exact date.</p> <p>5 Q. Was there an event that caused Harvard</p> <p>6 Pilgrim Health Care to become your current</p> <p>7 employer?</p> <p>8 A. Yes.</p> <p>9 Q. And what was that?</p> <p>10 A. It was the merger of Harvard Community</p> <p>11 Health Plan and Pilgrim Health Care.</p> <p>12 Q. And Harvard Community Health Plan and</p> <p>13 Harvard Pilgrim Health Care are different entities,</p> <p>14 aren't they?</p> <p>15 A. Yes.</p> <p>16 Q. They don't have any legal connection to</p> <p>17 each, are they?</p> <p>18 A. I don't know.</p> <p>19 Q. But they are separate and legal entities,</p> <p>20 aren't they?</p> <p>21 MR. HAAS: Objection to form.</p> <p>22 MR. HORGAN: Objection.</p> |

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18 (Pages 66 to 69)

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| <p>66</p> <p>1 A. Yes.</p> <p>2 Q. Now, when you worked for Harvard Community</p> <p>3 health care, you said that you purchased</p> <p>4 prescription drugs for the pharmacy at which you</p> <p>5 worked.</p> <p>6 A. Yes.</p> <p>7 Q. And which pharmacy was that? What was the</p> <p>8 location?</p> <p>9 A. I worked in Cambridge, Massachusetts.</p> <p>10 Q. Where in Cambridge?</p> <p>11 A. 1611 Cambridge Street, Cambridge,</p> <p>12 Massachusetts.</p> <p>13 Q. Was that the only Harvard Community Health</p> <p>14 Plan pharmacy that you worked at?</p> <p>15 A. No.</p> <p>16 Q. Did you work at other Harvard Community</p> <p>17 Health Plan pharmacies?</p> <p>18 A. Yes.</p> <p>19 Q. Which ones?</p> <p>20 A. The pharmacy located in Medford,</p> <p>21 Massachusetts.</p> <p>22 Q. Okay.</p> | <p>68</p> <p>1 each site.</p> <p>2 Q. Separately.</p> <p>3 A. Right.</p> <p>4 Q. And do you -- you don't have any knowledge</p> <p>5 with respect to the practices that they engaged in</p> <p>6 in those other pharmacies with respect to purchases</p> <p>7 of prescription drugs, do you?</p> <p>8 A. No.</p> <p>9 Q. Never saw their price lists?</p> <p>10 A. Yeah, I saw their pricing.</p> <p>11 Q. Okay. Did you participate in the</p> <p>12 negotiation of prescription drugs with respect to</p> <p>13 the other Harvard Community Health Plan pharmacies?</p> <p>14 A. Yes.</p> <p>15 Q. How did you participate?</p> <p>16 A. While I was working in Medford, if I</p> <p>17 negotiate a contract with a manufacturer, we</p> <p>18 requested that the pricing be offered at our other</p> <p>19 locations.</p> <p>20 Q. Okay. So, your responsibility was -- your</p> <p>21 direct responsibility was limited to the locations</p> <p>22 that you worked at. But you, in some cases, would</p> |
| <p>67</p> <p>1 A. I believe the address -- it's City Square</p> <p>2 Mall, Medford, Mass. I don't remember the exact</p> <p>3 number.</p> <p>4 Q. Okay. At the Medford Harvard Community</p> <p>5 Health Plan location, did you play a role in the</p> <p>6 purchase of prescription drugs?</p> <p>7 A. Yes.</p> <p>8 Q. Were there any other pharmacies that were</p> <p>9 part of the Harvard Community Health Plan group</p> <p>10 that you participated in the purchase of</p> <p>11 prescription drugs at?</p> <p>12 A. No.</p> <p>13 Q. So, you participated in the purchase of</p> <p>14 prescription drugs at two of the nine Harvard</p> <p>15 Community Health Plan pharmacies?</p> <p>16 A. Yes.</p> <p>17 Q. And the other Harvard Community Health</p> <p>18 Plan pharmacies each had a person who was</p> <p>19 responsible for the purchase of prescription drugs</p> <p>20 at each of those pharmacies, is that correct?</p> <p>21 A. I don't know that it was one person. But</p> <p>22 they were responsible for their own purchasing --</p> | <p>69</p> <p>1 negotiate contracts that would affect other</p> <p>2 pharmacies, is that correct?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. You were asked earlier about the</p> <p>5 range of prices and the range of discounts off WAC</p> <p>6 that you were able to obtain when you were</p> <p>7 purchasing products for the pharmacies that you</p> <p>8 worked at. Do you remember that?</p> <p>9 A. Yes.</p> <p>10 Q. Now, when you were asked about the range,</p> <p>11 were you recalling particular drugs that were at</p> <p>12 one end of the range or the other?</p> <p>13 A. No, just all drugs.</p> <p>14 Q. General range?</p> <p>15 A. Uh-huh.</p> <p>16 Q. And just so the record is clear, what</p> <p>17 years are we talking about when you were</p> <p>18 participating in the direct negotiation of</p> <p>19 prescription drug purchases?</p> <p>20 MR. HAAS: Objection to form.</p> <p>21 A. Range would be --</p> <p>22 Q. The years.</p> |

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19 (Pages 70 to 73)

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| <p style="text-align: right;">70</p> <p>1 A. Yeah. I'm trying to recall. '85, '86, 2 '87, somewhere in that range. 3 Q. Okay. So, somewhere between, say, 16 and 4 19 years ago, is that correct? 5 A. That's correct. 6 Q. And since that time, have you gone back 7 and looked at the contracts that you negotiated 8 when you were working in Cambridge or Medford? 9 A. No. 10 Q. Have you gone back and looked at the price 11 lists from the Cambridge and Medford days? 12 A. No. 13 Q. Do you have currently in your files the 14 contracts that you participated in negotiating 16 15 to 19 years ago? 16 A. No. 17 Q. So, when you said 10 to 90 percent, it was 18 really based on your recollection today of 19 negotiation from 16 to 19 years ago, is that 20 correct? 21 A. That's correct. 22 Q. You were asked about the range -- you</p> | <p style="text-align: right;">72</p> <p>1 Q. Does that pharmacy still exist? 2 A. Yes. 3 Q. You were asked earlier about how CMS 4 determines MAC. 5 A. Uh-huh. 6 Q. And I think you had said that it was based 7 on an average of AWP. 8 MR. HAAS: Objection to the form, 9 construction -- 10 A. That was in reference to HCFA. 11 Q. When you say, "HCFA," what do you mean? 12 A. Meaning before HCFA became CMS. I don't 13 know what the current CMS formulas look like today. 14 Q. Okay. Fair enough. So, what period of 15 time were you talking about when you responded to 16 the question concerning how MAC was determined? 17 A. Maybe five years ago. 18 Q. You were also asked whether you were aware 19 of another pharmacy that paid AWP for its 20 prescription drugs. Do you remember that? 21 A. Uh-huh. 22 Q. And you referred to a pharmacy in Athol</p> |
| <p style="text-align: right;">71</p> <p>1 weren't asked about averages. Did you ever have 2 any occasion to develop sort of an average discount 3 off WAC? 4 A. No. 5 Q. As you sit here today, you don't know what 6 the average would be? 7 A. No. 8 Q. Are the actual contracts that you 9 participated in working out on behalf of Harvard 10 Community Health Plan 16 to 19 years ago, are they 11 currently in the possession of Harvard Pilgrim 12 Health Care? 13 A. No, not to my knowledge. 14 Q. Where do you think they are? 15 A. I don't know. 16 Q. Would you have -- 17 A. I mean, they -- I don't know. They'd be 18 at this -- at the pharmacy, I guess. I don't 19 know -- if anywhere. 20 Q. When you say, "the pharmacy," you mean -- 21 I don't know what you mean by that. 22 A. At Medford, for example.</p> | <p style="text-align: right;">73</p> <p>1 when you were an intern. 2 A. (Witness nods.) 3 Q. Now, are you aware of what -- currently -- 4 what any other pharmacies -- strike that. Are you 5 aware currently of what any other purchasers of 6 prescription drugs pay for their prescription 7 drugs? 8 A. No. 9 Q. You don't know what CVS pays, do you? 10 A. No. 11 Q. Or other third-party payers, do you? 12 A. No. 13 Q. Do you know what consumers pay for 14 prescription drugs? 15 A. No. 16 Q. Other insurance companies? 17 A. No. 18 Q. So, when you said you were not aware of 19 any other purchaser other than the Athol pharmacy 20 that paid AWP, and you said no, the reason you 21 answered no is because you don't know what anybody 22 else pays for its prescription drugs, is that</p> |

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| <p>74</p> <p>1 correct?</p> <p>2 MR. HAAS: Objection.</p> <p>3 A. That's correct.</p> <p>4 Q. With respect to your specialty pharmacy</p> <p>5 contracts, the rates that are -- reimbursement</p> <p>6 rates that are paid to Brookline Village Apothecary</p> <p>7 and Freedom Drug, as set forth in the contracts</p> <p>8 that are identified as Exhibits 3 and Exhibits 4,</p> <p>9 those rates are identical, aren't they?</p> <p>10 A. Yes.</p> <p>11 Q. Why is it that they're identical?</p> <p>12 MR. HORGAN: Objection.</p> <p>13 A. Because I set the rates. I negotiated</p> <p>14 those rates.</p> <p>15 Q. And why is it that you determined that</p> <p>16 they were to be identical?</p> <p>17 MR. HORGAN: Objection.</p> <p>18 A. They were determined to be identical,</p> <p>19 because we bid out the business as a dual award to</p> <p>20 two pharmacies.</p> <p>21 Q. So, as between the two pharmacies, there</p> <p>22 was no competition based on rates.</p> | <p>76</p> <p>1 Q. Have you ever received any information</p> <p>2 from the AWP publishers, Redbook, Medi-Span,</p> <p>3 concerning how AWP is set?</p> <p>4 A. No.</p> <p>5 Q. You have no direct knowledge as to how</p> <p>6 they determine AWP one way or another, is that</p> <p>7 correct?</p> <p>8 A. That's correct.</p> <p>9 Q. Did you ever meet with the Redbook people?</p> <p>10 A. No, not that I recall.</p> <p>11 Q. Does Harvard Community Health Plan then --</p> <p>12 you have a subscription to Redbook?</p> <p>13 A. Yes, we do.</p> <p>14 Q. And so, you get the AWP's based on the</p> <p>15 published number.</p> <p>16 A. That's one of the sources, yes.</p> <p>17 Q. What other sources?</p> <p>18 A. First Data Bank.</p> <p>19 Q. That is, you get the AWP information from</p> <p>20 the third-party sources?</p> <p>21 A. Correct.</p> <p>22 Q. Do you ever receive AWP information from</p> |
| <p>75</p> <p>1 MR. HAAS: Objection.</p> <p>2 MR. HORGAN: Objection.</p> <p>3 A. That's correct.</p> <p>4 Q. And you were asked earlier with respect to</p> <p>5 negotiation of rebates whether you ever had</p> <p>6 considered negotiating a rebate off of AWP as</p> <p>7 opposed to WAC. Do you remember that question?</p> <p>8 A. Yes.</p> <p>9 Q. And you answered that you hadn't</p> <p>10 considered that.</p> <p>11 A. Correct.</p> <p>12 Q. And why is that?</p> <p>13 MR. HORGAN: Objection.</p> <p>14 MR. HAAS: Objection.</p> <p>15 A. The contracts offered from all the</p> <p>16 manufacturers use WAC as the reference.</p> <p>17 Q. Okay. Now, you understand that AWP is a</p> <p>18 number that comes from First Data Bank and other</p> <p>19 sources. Is that your understanding?</p> <p>20 MR. HORGAN: Objection.</p> <p>21 MR. HAAS: Objection. Same objection.</p> <p>22 A. I understand that they publish that price.</p> | <p>77</p> <p>1 manufactures?</p> <p>2 A. Sometimes.</p> <p>3 Q. What instances are you thinking of?</p> <p>4 A. We'll get a notice of a new medication,</p> <p>5 and there will be kind of an informational sheet</p> <p>6 that says, Here's the drug. Here's the NDC number.</p> <p>7 Here's the AWP price.</p> <p>8 Q. Okay. Is that regularly how</p> <p>9 pharmaceutical manufacturers let purchasers know</p> <p>10 what the list price and what the AWP will be?</p> <p>11 MR. HAAS: Objection to form.</p> <p>12 A. I mean, I don't know for certain.</p> <p>13 Q. But that's one of the ways that you</p> <p>14 receive AWP information.</p> <p>15 A. Correct.</p> <p>16 Q. Okay. Now, in your negotiation with</p> <p>17 prescription drug manufacturers, do you ever</p> <p>18 receive information from those manufacturers as to</p> <p>19 what their costs of -- their actual costs of</p> <p>20 production are?</p> <p>21 A. No.</p> <p>22 Q. Are you ever provided with information as</p> |

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| <p style="text-align: right;">78</p> <p>1 to what the prices are that they sell -- they</p> <p>2 actually sell their products for?</p> <p>3 MR. HORGAN: Objection.</p> <p>4 A. Yes.</p> <p>5 Q. What sort of information have you received</p> <p>6 from manufacturers concerning actual prices?</p> <p>7 A. I get a price list or a catalog with the</p> <p>8 price.</p> <p>9 Q. But you understand the -- and you</p> <p>10 understand the price list or the catalog list to be</p> <p>11 the actual price that the manufacturer sells the</p> <p>12 product for, is that correct?</p> <p>13 MR. HAAS: Objection to form.</p> <p>14 A. To the group that the price list</p> <p>15 represents. So, if it's a, you know, hospital</p> <p>16 price list, this is the price to hospitals, that</p> <p>17 type of thing, yes.</p> <p>18 Q. So, have you ever received a price list</p> <p>19 directed to third-party payers that is different</p> <p>20 from a price list that you've also received to</p> <p>21 other kinds of purchasers?</p> <p>22 A. No.</p> | <p style="text-align: right;">80</p> <p>1 determining what price you should negotiate for</p> <p>2 Harvard Community Health Plan members and Harvard</p> <p>3 Pilgrim members?</p> <p>4 MR. HAAS: Objection to form.</p> <p>5 MR. HORGAN: Objection.</p> <p>6 A. I'm not sure.</p> <p>7 Q. Okay.</p> <p>8 MR. NALVEN: Thank you. I have nothing</p> <p>9 further.</p> <p>10 REDIRECT EXAMINATION</p> <p>11 BY MR. HAAS:</p> <p>12 Q. I just have one follow-up question with</p> <p>13 respect to the questions of Plaintiffs' counsel.</p> <p>14 Who at Harvard Community was responsible for</p> <p>15 contracting with manufacturers and wholesalers</p> <p>16 during the 1990s for Harvard Community-staffed HMO</p> <p>17 pharmacies?</p> <p>18 A. That would be Ken Kazarosian.</p> <p>19 Q. And what is his position today?</p> <p>20 A. He's a -- I was just talking to him. I</p> <p>21 believe it's pharmacy contracts consultant is his</p> <p>22 title.</p> |
| <p style="text-align: right;">79</p> <p>1 Q. If you had received information concerning</p> <p>2 how pharmaceutical manufacturers price their</p> <p>3 products with respect to all purchasers, could you</p> <p>4 have done a better job in negotiating prices for</p> <p>5 Harvard Community Health Plan and its members?</p> <p>6 MR. HAAS: Objection. Hypothetical.</p> <p>7 MR. HORGAN: Objection.</p> <p>8 A. I don't know.</p> <p>9 Q. The more information you have concerning</p> <p>10 the manufacturers' price, the easier it is for you</p> <p>11 to get a good price, isn't it?</p> <p>12 MR. HAAS: Objection to form.</p> <p>13 MR. HORGAN: Objection.</p> <p>14 A. I would say no.</p> <p>15 Q. Why would you say that?</p> <p>16 A. Because the manufacturers are subject to</p> <p>17 government rebates, which has an impact on price.</p> <p>18 Q. Okay. So, let me ask you this: If you</p> <p>19 had information from prescription-type drug makers</p> <p>20 as to what their costs are, what they charge</p> <p>21 government purchasers, what they charge double</p> <p>22 purchasers, would that help you as a purchaser in</p> | <p style="text-align: right;">81</p> <p>1 Q. So, it's fair to say that he was involved</p> <p>2 in purchasing of drugs from manufacturers and</p> <p>3 wholesalers on behalf of Harvard Community during</p> <p>4 the 1990s, and he currently is responsible or</p> <p>5 involved with the negotiation or contracting with</p> <p>6 pharmacies for reimbursement by Harvard Pilgrim to</p> <p>7 the pharmacies, is that correct?</p> <p>8 MR. HORGAN: Objection to form.</p> <p>9 A. No.</p> <p>10 Q. I'm just trying to seek clarification as</p> <p>11 to his positions. Please explain to me his role</p> <p>12 during the 1990s with respect to contracting with</p> <p>13 manufacturers for the purchase of drugs or purchase</p> <p>14 from wholesalers of drugs on behalf of the staff</p> <p>15 model HMO and his role today in pharmacy</p> <p>16 contracting.</p> <p>17 A. Okay. The role in the early '90s was to</p> <p>18 negotiate contracts with manufacturers. And then</p> <p>19 those contracts were extended to the staff model</p> <p>20 pharmacies, and each pharmacy operated</p> <p>21 independently in terms of all its own purchasing.</p> <p>22 So, Ken never placed any orders. He just</p> |

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| <p>1 negotiated a contract rate, then it was made</p> <p>2 available to the sites for purchase or for use.</p> <p>3 Q. Uh-huh.</p> <p>4 A. His role today, he continues to negotiate</p> <p>5 contracts on behalf of the closed-clinic</p> <p>6 pharmacies. And it's the same basic arrangement.</p> <p>7 Each pharmacy chooses which drugs to buy. They</p> <p>8 purchase off of the Harvard Pilgrim contract.</p> <p>9 Q. When you refer to "closed-clinic</p> <p>10 pharmacies," what are you referring to?</p> <p>11 A. The pharmacies that are restricted to</p> <p>12 Harvard Pilgrim members only.</p> <p>13 MR. HAAS: Okay. No further questions.</p> <p>14 MR. NALVEN: Nothing further.</p> <p>15 (Whereupon the deposition ended at</p> <p>16 12:50 p.m.)</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> | 82 |
| <p>1 Commonwealth of Massachusetts</p> <p>2 Middlesex, ss.</p> <p>3 I, P. Jodi Ohnemus, Notary Public</p> <p>4 in and for the Commonwealth of Massachusetts,</p> <p>5 do hereby certify that there came before me</p> <p>6 on the 20th day of September, 2004, the deponent</p> <p>7 herein, who was duly sworn by me; that the ensuing</p> <p>8 examination upon oath of the said deponent was</p> <p>9 reported stenographically by me and transcribed</p> <p>10 into typewriting under my direction and control;</p> <p>11 and that the within transcript is a true record of</p> <p>12 the questions asked and answers given at said</p> <p>13 deposition.</p> <p>14 I FURTHER CERTIFY that I am neither</p> <p>15 attorney nor counsel for, nor related to or</p> <p>16 employed by any of the parties to the action</p> <p>17 in which this deposition is taken; and, further,</p> <p>18 that I am not a relative or employee of any</p> <p>19 attorney or financially interested in the outcome</p> <p>20 of the action.</p> <p>21 IN WITNESS WHEREOF I have hereunto set my</p> <p>22 hand and affixed my seal of office this</p> <p>20th day of September, 2004, at Waltham.</p> <p>_____</p> <p>_____</p> <p>P. Jodi Ohnemus, RPR, RMR, CRR Notary Public, Commonwealth of Massachusetts My Commission Expires: 4/21/2007</p> | 83 |

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